Dr. Miles Medical Co. Vs. John D. Park and Sons Co.

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Appeal No. : 220 U.S. 373

Appellant : Dr. Miles Medical Co.

Respondent : John D. Park and Sons Co.

Judgement :

Dr. Miles Medical Co. v. John D. Park & Sons Co. - 220 U.S. 373 (1911)
U.S. Supreme Court Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)

Dr. Miles Medical Company v.

John D. Park & Sons Company

No. 72

Argued January 4, 5, 1911

Decided April 3, 1911

220 U.S. 373

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SYLLABUS

An actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break the contract to the injury of the other, and in the absence of an adequate remedy at law equitable relief will be granted; but *held,* in this case, that plaintiffs were not entitled to relief as the contract under which they claimed was invalid.

A system of contracts between manufacturers and wholesale and retail merchants by which the manufacturers attempt to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, eliminating all competition and fixing the amount which the consumer shall pay, amounts to restraint of trade, and is invalid both at common law and, so far as it affects interstate commerce, under the Sherman Anti-Trust Act of July 2, 1890, and so *held* as to the contracts involved in this case.

Such agreements are not excepted from the general rule and rendered valid because they relate to proprietary medicines manufactured under a secret process but not under letters patent; nor is a manufacturer entitled to control prices on all sales of his own products in restraint of trade.

The rights enjoyed by a patentee are derived from statutory grant under authority conferred by the Constitution, and are the reward received in exchange for advantages derived by the public after the period of protection has expired, and the rights of one not disclosing his secret process so as to secure a patent are outside of the policy of the patent laws, and must be determined by the legal principles applicable to the ownership of such process.

The protection of an unpatented process of manufacture does not necessarily apply to the sale of articles manufactured under the process.

A manufacturer of unpatented proprietary medicines stands on the same footing as to right to control the sale of his product as the manufacturers of other articles, and the fact that the article may

Page 220 U. S. 374

have curative properties does not justify restrictions which are unlawful as to articles designed for other purposes.

A manufacturer of unpatented articles cannot, by rule or notice, in absence of statutory right, fix prices for future sales, even though the restriction be known to purchasers. Whatever rights the manufacturer may have in that respect must be by agreements that are lawful.

Although the earlier common law doctrine in regard to restraint of trade has been substantially modified, the public interest is still the first consideration; to sustain the restraint, it must be reasonable as to the public and parties and limited to what is reasonably necessary, under the circumstances, for the covenantee; otherwise, restraints are void as against public policy.

Agreements or combinations between dealers, having for their sole purpose the destruction of competition and fixing of prices, are injurious to the public interest and void; nor are they saved by advantages which the participants expect to derive from the enhanced price to the consumer.

161 F. 803 affirmed.

This is a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Sixth Circuit which affirmed a judgment of the circuit court dismissing, on demurrer, the bill of complaint for want of equity. 164 F. 803.

The complainant, Dr. Miles Medical Company, an Indiana corporation, is engaged in the manufacture and sale of proprietary medicines, prepared by means of secret methods and formulas, and identified by distinctive packages, labels, and trademarks. It has established an extensive trade throughout the United States and in certain foreign countries. It has been its practice to sell its medicines to

jobbers and wholesale druggists, who in turn sell to retail druggists for sale to the consumer. In the case of each remedy, it has fixed not only the price of its own sales to jobbers and wholesale dealers, but also the wholesale and retail prices. The bill alleged that most of its sales were made through retail druggists, and that the demand for its remedies largely depended upon their

Page 220 U. S. 375

goodwill and commendation, and their ability to realize a fair profit; that certain retail establishments, particularly those known as department stores, had inaugurated a "cut-rate" or "cut-price" system which had caused "much confusion, trouble, and damage" to the complainant's business, and "injuriously affected the reputation" and "depleted the sales" of its remedies; that this injury resulted "from the fact that the majority of retail druggists as a rule cannot, or believe that they cannot, realize sufficient profits" by the sale of the medicines "at the cut-prices announced by the cut-rate and department stores," and therefore are "unwilling to, and do not keep" the medicines "in stock," or,

"if kept in stock, do not urge or favor sales thereof, but endeavor to foist off some similar remedy or substitute, and from the fact that in the public mind an article advertised or announced at 'cut' or 'reduced' price from the established price suffers loss of reputation and becomes of inferior value and demand."

It was further alleged that, for the purpose of protecting "its trade sales and business" and of conserving "its goodwill and reputation," the complainant had established a method "of governing, regulating, and controlling the sale and marketing" of its remedies, which is thus described in the bill:

"Contracts in writing were required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines, and cures, of the following tenor and effect:"

" *Consignment Contract -- Wholesale* "

"The Dr. Miles Medical Company"

"This agreement made by and between The Dr. Miles Medical Company, a corporation, of Elkhart, Indiana, hereafter referred to as the Proprietor, and _____ _____ hereinafter referred to as the Consignee, witnesseth:"

"That the said Proprietor hereby appoints said Consignee

Page 220 U. S. 376

one of its wholesale distributing agents, and agrees to consign to such Consignee for sale for the account of said Proprietor such goods of its manufacture as the Proprietor may deem necessary, the title thereto and property therein to be and remain in the Proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said Proprietor on demand and the cancellation of this agreement. Said goods to be invoiced to Consignee at the following prices:"

"Medicines of which the retail price is $1.00, $8.00 per dozen."

"Medicines (if any) of which the retail price is 50 cents, $4.00 per dozen."

"Medicines of which the retail price is 25 cents, $2.00 per dozen."

"Freight on all orders, the invoice price of which amounts to $100.00 or more, to be prepaid by the Proprietor; otherwise, freight to be paid by Consignee."

"Said Consignee agrees to confine the sale of all goods and products of the said Proprietor strictly to, and to sell only to, the designated retail agents of said Proprietor as specified in lists of such retail agents furnished by said Proprietor and alterable at the will of said Proprietor, and to faithfully and promptly account and pay to the Proprietor the proceeds of all sales, after deducting as full compensation for all services, charges, and disbursements a commission of ten percent of the invoice value, and a further commission of five percent on the net amount of each consignment, after deducting the said ten percent commission on all advances on account remitted within ten days from date of any consignment, it being agreed between the parties hereto that such advances shall in no manner affect the title to such goods, which title shall remain in the Proprietor as if no such

advances had been made; provided that such advances

Page 220 U. S. 377

shall be repaid to said Consignee should the said Proprietor terminate this agreement and the return of any unsold goods on which advances have been made. Said Consignee guarantees the payment for all goods sold under this agreement, and agrees to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding. Failure to make such accounting and remittance within ten days from the first of each month shall render the whole account payable and subject to draft, but the proceeds of such draft shall not affect the title of any unsold goods, which shall remain in the Proprietor until actually sold, as herein provided."

"It is further agreed that the Consignee shall furnish the Proprietor from time to time upon demand full statements of the stock of goods of the Proprietor on hand on any date specified, and that a failure to furnish such statements within ten days from date of such demand shall be a sufficient cause for the cancellation of this agreement, and a demand for the return of the consigned goods."

"It is further agreed that the Proprietor will cause each retail package of its goods to be identified by a number, and said Consignee hereby agrees to furnish the said Proprietor full reports upon proper cards or blanks furnished by said Proprietor of the disposition of each dozen or fraction of such goods by means of the identifying numbers, specifying the names and addresses of the retail agents to whom such goods have been delivered and the dates of such delivery, and to send such reports to said Proprietor at least semimonthly, and at any other time on the request of said Proprietor."

"It is understood and agreed between the parties hereto that the commissions herein specified shall not be considered as earned by said Consignee upon any goods of said Proprietor which shall have been delivered to dealers not authorized agents of said Proprietor, as per list of

Page 220 U. S. 378

such agents, or upon any goods whose disposition by said Consignee shall not have been properly reported as herein provided, or sold at prices less than the prices authorized, and that said Consignee shall not credit any such commissions when making remittances on consignment account provided notice has been given by said Proprietor that such commissions are unearned, and that, if such unearned commissions have been deducted by said Consignee in making advance payments or monthly remittances on account, they shall be charged back to said Consignee and credited and paid to said Proprietor. It is understood that violation or nonobservance of any provision hereof by the Consignee shall make this agreement terminable and all unsold goods returnable at the option of the Proprietor."

"It is agreed that the goods of said Proprietor shall be sold by said Consignee only to the said retail or wholesale agents of said Proprietor, as per list furnished at not less than the following prices, to-wit:"

"Medicines of which the retail price is $1.00, $8.00 per dozen."

"Medicines (if any) of which the retail price is 50 cents, $4.00 per dozen."

"Medicines of which the retail price is 25 cents, $2.00 per dozen."

"Provided, that said Consignee may allow a cash discount not exceeding one percent, if paid within ten days from date of invoice, and that, when sales at one time and at one invoice amount to $15.00 or more, the said Consignee may allow three percent trade discount, and if said purchase amounts to $50.00 or more, five percent trade discount, all without cost to the Proprietor, and if such $50.00 quantity shall be shipped direct to the retail purchaser from the laboratory of said Proprietor, on the order from said wholesale distributing agent, freight will be prepaid by the Proprietor, but not otherwise. "

Page 220 U. S. 379

"This contract will take effect when the original, duly signed by the Consignee, has been received and accepted by The Dr. Miles Medical Company at Elkhart,

Indiana."

"Done under our hands _____ A.D.1907."

"Fill in date on above line."

"The DR. MILES MEDICAL COMPANY"

"_____ _____, *Wholesale Dealer* "

"Sign your name on above line."

"Original. Return in enclosed envelop."

"And written contracts were required with all retailers of your orator's said proprietary remedies, medicines, and cures, as follows:"

" *Retail Agency Contract* "

" *The Dr. Miles Medical Company"*

"This agreement between The Dr. Miles Medical Company of Elkhart Indiana, and _____ _____, of _____ _____,"

"Retailer's name on above line. Town. State."

"hereinafter referred to as retail agent, witnesseth:"

" *Appointed Agent* "

"The said Dr. Miles Medical Company hereby appoints said retail dealer as one of the retail distributing agents of its proprietary medicines, and agrees that said retail agent may purchase the proprietary medicines manufactured by said Dr. Miles Medical Company (each retail package of which the said company will cause to be identified by a number) at the following prices, to-wit:"

" *Wholesale Prices* "

"Medicines of which the retail price is $1.00, $8.00 per dozen."

"Medicines of which the retail price is 50 cents, $4.00 per dozen."

"Medicines of which the retail price is 25 cents, $2.00 per dozen."

" *Quantity Discount* "

"Provided that, when purchases at one time and on one invoice amount to $15.00 (or more), wholesale distributing

Page 220 U. S. 380

agents are authorized to allow three percent trade discount; if such purchase amounts to $50.00 (or more) five percent trade discount will be allowed, and if such $50.00 quantity be shipped direct to the purchaser from the laboratory of said Dr. Miles Medical Company for the account of such wholesale agent, freight will be prepaid, but not otherwise."

" *Full Price* "

"In consideration whereof, said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm, or corporation whatsoever at less than the full retail price as printed on the packages, without reduction for quantity, and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company."

" *Violation* "

"It is further agreed between the parties hereto that the giving of any article of value, or the making of any concession by means of trading stamps, cash register coupons, or otherwise, for the purpose of reducing the price above agreed upon, shall be considered a violation of this agreement, and further it is agreed between the parties hereto that the Dr. Miles Medical Company will sustain damage in the sum of twenty-five dollars ($25.00) for each violation of any provision of this

agreement, it being otherwise impossible to fix the measure of damage."

"This contract will take effect when a duplicate thereof, duly signed by the retail agent, has been received and approved by The Dr. Miles Company at its office at Elkhart, Indiana."

"Done under our hands _____, A.D.1907."

"Fill in date on above line."

"THE DR. MILES MEDICAL COMPANY"

"_____ _____, *Retail Dealer* "

"Sign your name on above line in ink. "

Page 220 U. S. 381

"To Retail Dealer:"

"Paste printed label, giving name and address, that your name may be correctly listed."

"Duplicate. Keep for reference."

As an aid to the maintenance of the prices thus fixed, the company devised a system for tracing and identifying, through serial numbers and cards, each wholesale and retail package of its products.

It was alleged that all wholesale and retail druggists, "and all dealers in proprietary medicines," had been given full opportunity, without discrimination, to sign contracts in the form stated, and that such contracts were in force between the complainant "and over four hundred jobbers and wholesalers and twenty-five thousand retail dealers in proprietary medicines in the United States."

The defendant is a Kentucky corporation conducting a wholesale drug business. The bill alleged that the defendant had formerly dealt with the complainant, and

had full knowledge of all the facts relating to the trade in its medicines; that it had been requested, and refused, to enter into the wholesale contract required by the complainant; that in the City of Cincinnati, Ohio, where the defendant conducted a wholesale drug store, there were a large number of wholesale and retail druggists who had made contracts of the sort described, with the complainant, and kept its medicines on sale pursuant to the agreed terms and conditions. It was charged that the defendant,

"in combination and conspiracy with a number of wholesale and retail dealers in drugs and proprietary medicines, who have not entered into said wholesale and retail contracts"

required by the complainant's system, and solely for the purpose of selling the remedies to dealers "to be advertised, sold, and marketed at cut rates," and "to thus attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit" from the

Page 220 U. S. 382

sales of the remedies, had unlawfully and fraudulently procured them from the complainant's "wholesale and retail agents" by means

"of false and fraudulent representations and statements, and by surreptitious and dishonest methods, and by persuading and inducing, directly and indirectly,"

a violation of their contracts.

It is further charged that the defendant, having procured the remedies in this manner, had advertised and sold them at less than the jobbing and retail prices established by the complainant, and that, for the purpose of concealing the source of supply, the identifying serial numbers, which had been stamped upon the labels and cartons, had been obliterated by the defendant or by those acting in collusion with the defendant, and the labels and cartons had been mutilated, thus rendering the list of ailments and directions for use illegible, and that the remedies in this condition were sold both to the wholesale and retail dealers, and ultimately to

buyers for use at cut rates.

The bill prayed for an injunction restraining the defendant from inducing or attempting to induce any party to any of the said "wholesale or retail agency contracts" to "violate or break the same, or to sell or deliver to the defendant, or to any person for it," the complainant's remedies; from procuring or attempting to procure in any way any of these remedies from wholesale or retail dealers who had executed the contracts; from advertising, selling, or offering for sale the remedies obtained by any of the described means at less "than the established retail price thereof," or to dealers who had not entered into contract with the complainant; from in any way obliterating, mutilating, removing, or covering up the labels and cartons upon the bottles containing the remedies, and from making sales without such labels and cartons, and the letter press and numerals thereon, being intact. There was also a prayer for an accounting.

Page 220 U. S. 394

MR. JUSTICE HUGHES, after making the above statement, delivered the opinion of the Court.

The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products, both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the state respectively. To accomplish this result, it has adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other. The one sort of contract, known as " *Consignment Contract -- Wholesale,* " has been made with over four hundred jobbers and wholesale dealers, and the other described as " *Retail Agency Contract,* " with twenty-five thousand retail dealers in the United States.

The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at "cut prices" by inducing those who have made the contracts to violate the restrictions. The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate

Page 220 U. S. 395

remedy at law, equitable relief will be granted. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.,* 151 U. S. 1 ; *Bitterman v. Louisville & Nashville Railroad Co.,* 207 U. S. 205 .

The principal question is as to the validity of the restrictive agreements.

Preliminarily there are opposing contentions as to the construction of the agreements, or at least, of that made with jobbers and wholesale dealers. The complainant insists that the "consignment contract" contemplates a true consignment for sale for account of the complainant, and that those who make sales under it are the complainant's agents, and not its vendees. The court below did not so construe the agreement, and considered it an effort

"to disguise the wholesale dealers in the mask of agency, upon the theory that in that character one link in the system for the suppression of the 'cut rate' business might be regarded as valid,"

and that, under this agreement "the jobber must be regarded as the general owner, and engaged in selling for himself, and not as a mere agent of another." 164 F. 805.

There are certain allegations in the bill which do not accord with the complainant's argument. Thus, it is alleged that it "has been and is the uniform custom" of the complainant

"to sell said medicines, remedies, and cures to jobbers and wholesale druggists, who in turn sell and dispose of the same to retail druggists for sale and distribution to the ultimate purchaser or consumer."

And in setting forth the form of the agreement in question it is alleged that it was "required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines, and cures." It is further stated that, as a means of maintaining "said list of prices," cards bearing serial identifying numbers are placed in each package of remedies "sold to jobbers and wholesale druggists." But it is also alleged in the bill that, under the provisions

of the contract the title to the medicines remained in the complainant "until actual sale in good faith to retail dealers, as therein provided."

Turning to the agreement itself, we find that it purports to appoint the party with whom it is made one of the complainant's "wholesale distributing agents," and it is agreed that the complainant, as proprietor, shall consign to the agent "for sale for the account of said proprietor" such goods as it may deem necessary,

"the title thereto to remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancellation of this agreement."

The goods are to be invoiced to the Consignee at stated prices, which are the same as the minimum prices at which the Consignee is allowed to sell. It is also agreed that the consignee shall

"faithfully and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation . . . a commission of ten percent of the invoice value, and a further commission of five percent on the net amount of each consignment after deducting the said ten percent commission on all advances on account remitted within ten days from the date of any consignment,"

such advances, however, not to affect the title to the goods, and to be repaid should the agreement be terminated and unsold goods, on which advances had been made, be returned. The consignee guarantees payment for all goods sold, and promises "to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding."

The consignee agrees

"to sell only to the designated retail agents of said proprietor, as specified in lists of such retail agents furnished by said proprietor, and alterable at the will of said proprietor."

A further provision permits sales "only to the said retail or wholesale agents

Page 220 U. S. 397

of said proprietor, as per list furnished." No time is fixed for the duration of the agreement.

It is urged that the additional commission of five percent is to induce, through the guise of "advances," payment for the goods before sales are made, and that unsold goods are to be returned only on the complainant's demand and the cancellation of the agreement. But the consignee is not bound to make these "advances," and it is distinctly provided that he shall not acquire title by making them. It is also said that the consignee may sell at prices higher than those listed, but he is bound by the agreement to account for "the proceeds of all sales," less the stipulated commissions. Nor is the provision as to the time for accounting and remittance of net proceeds to be regarded as inconsistent with agency, in the absence of a showing that, in the actual transactions and accounts, the consignee was treated as selling on his own behalf and paying as purchaser.

If, however, we consider the "consignment contract" as one which in legal effect provides for consignments of goods to be sold by an agent for his principal's account, and that the tenor of the agreement, as set forth, must be taken to override the inconsistent general allegations to which we have referred, this alone

would not be sufficient to support the bill.

The bill charges that the defendant has unlawfully and fraudulently procured the proprietary medicines from the complainant's "wholesale and retail agents" in violation of their contracts. But it does not allege that the goods procured by the defendant from "wholesale agents" were goods consigned to the latter for sale. The description "wholesale agent" refers to those who have signed the "consignment contract." This contract, however, permits one "wholesale agent" to sell to another "wholesale agent." For all that appears, the goods procured by the defendant may have been purchased by the defendant's

Page 220 U. S. 398

vendors from other wholesale agents. The bill avers that, prior to the introduction of the described system, the defendant, a wholesale house, had dealt in the remedies, and had purchased them from the complainant and from "wholesale druggists and jobbers." There is nothing in the bill which is inconsistent with such an actual course of dealing, permitted by the agreement itself, with respect to the wholesale dealers who have signed it. But the goods which one wholesale agent purchased from another wholesale agent would not be held for sale as consigned goods belonging to the complainant, and to be accounted for as such, and their sale by the wholesale dealer, who had acquired title, would be made for his own account, and not for that of the complainant. The allegations of the bill and the plain purpose of the system of contracts do not permit the conclusion that it was intended that wholesale dealers purchasing goods in this way should be free to sell to anyone at any price. Evidently it was not contemplated that the restrictions of the system should be escaped in such a simple manner. But if the restrictions of the "consignment contract" as to prices and vendees are to be deemed to apply to the sale of goods which one wholesale dealer has purchased from another, it is evident that the validity of the restrictions in this aspect must be supported on some other ground than that such sale is made by the wholesale dealer as the agent of the complainant. The case presented by the bill cannot properly be regarded as one for inducing breach of trust by an agent.

The other form of contract adopted by the complainant, while described as a "retail agency contract," is clearly an agreement looking to sale, and not to agency. The so-called "retail agents" are not agents at all, either of the complainant or of its consignees, but are contemplated purchasers who buy to sell again -- that is, retail dealers. It is agreed that they may purchase the medicines manufactured

Page 220 U. S. 399

by the complainant at stated prices. There follows this stipulation:

"In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm, or corporation whatsoever at less than the full retail price as printed on the packages, without reduction for quantity, and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company."

It will be noticed that the "retail agents" are not forbidden to sell either to wholesale or retail dealers if these are "accredited agents" of the complainant -- that is, if the dealers have signed either of the two contracts the complainant requires. But the restriction is intended to apply whether the retail dealers have bought the goods from those who held under consignment or from other dealers, wholesale or retail, who had purchased them. And in which way the "retail agents" who supplied the medicines to the defendant had bought them is not shown.

The bill asserts complainant's "right to maintain and preserve the aforesaid system and method of contracts and sales adopted and established by it." It is, as we have seen, a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition. The essential features of such a system are thus described by MR. JUSTICE LURTON (then circuit judge), in the opinion of the circuit court of appeals in the case of *John D. Park & Sons Co. v. Hartman,* 153

F. 24:

"The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell

Page 220 U. S. 400

below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus, all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus, a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about."

That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with "most of the jobbers and wholesale druggists and a majority of the retail druggists of the country," and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several states, is also clear. *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211 ; *E. Bement & Sons v. National Harrow Co.,* 186 U. S. 92 ; *W. W. Montague & Co. v. Lowry,* 193 U. S. 38 ; *Swift & Co. v. United States,* 196 U. S. 375 .

But it is insisted that the restrictions are not invalid either at common law or under the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, upon the following grounds, which may be taken to embrace the fundamental contentions for the complainant: (1) that the restrictions are valid because they relate to proprietary medicines manufactured under a secret process, and (2) that, apart from this, a manufacturer is entitled to control the prices on all sales of his own products.

First. The first inquiry is whether there is any distinction,

with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to right secured by letters patent. *E. Bement & Sons v. National Harrow Co.,* 186 U. S. 70 . In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent, with stipulations as to the prices at which the licensee should sell. The Court said, referring to the Act of July 2, 1890 (p. 186 U. S. 92):

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use, and sale. As was said by Chief Justice Marshall in *Grant v. Raymond,* 6 Pet. pp. 31 U. S. 241 -243:

"It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. . . . The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged. . . . The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation

made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use, and sell the things discovered for a limited time."

The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute, and thus to secure the privileges it confers. Its case lies outside the policies of the patent law, and the extent of the right which that law secures is not here involved or determined.

The complainant relies upon the ownership of its secret process and its rights are to be determined accordingly. Anyone may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its rights in the process by fraud or by breach of trust or contract. *Tabor v. Hoffman,* 118 N.Y. 36; *Chadwick v. Covell,* 151 Mass.190. The secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices. *Fowle v. Park,* 131 U. S. 88 . A similar principle obtains with respect to the confidential communication of quotations collected by a board of trade. *Board of Trade v. Christie Grain & Stock Co.,* 198 U. S. 236 .

Here, however, the question concerns not the process of manufacture, but the manufactured product -- an article of commerce. The complainant has not communicated its process in trust, or under contract, or executed a license for the use of the process with restrictions as to the manufacturer and sale by the licensee to whom the communication is made. The complainant has retained its secret, which apparently it believes to be undiscoverable. Whether its remedies are sold or unsold, whether the restrictions as to future sales are valid or invalid, the complainant's secret remains intact. That the complainant may rightfully object

to attempts to discover it by fraudulent means, or to a breach of trust or contract relating to the process, does not require the conclusion that it is entitled to

establish restrictions with respect to future sales by those who purchase its manufactured product. It is said that the remedies "embody" the secret. It would be more correct to say that they are manufactured according to the secret process, and do not constitute a communication of it. It is also urged that, as the process is secret, no one else can manufacture the article. But this argument rests on monopoly of production, and not on the secrecy of the process or the particular fact that may confer that monopoly. It implies that if, for any reason, monopoly of production exists, it carries with it the right to control the entire trade of the produced article, and to prevent any competition that otherwise might arise between wholesale and retail dealers. The principle would not be limited to secret processes, but would extend to goods manufactured by anyone who secured control of the source of supply of a necessary raw material or ingredient. But because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title. Moreover, every manufacturer, before sale, controls the articles he makes. With respect to these, he has the rights of ownership, and his dominion does not depend upon whether the process of manufacture is known or unknown, or upon any special advantage he may possess by reason of location, materials, or efficiency. The fact that the market may not be supplied with the particular article unless he produces it is a practical consequence which does not enlarge his right of property in what he does produce.

If a manufacturer, in the absence of statutory privilege, has the control over the sales of the manufactured article

Page 220 U. S. 404

for which the complainant here contends, it is not because the process of manufacture is kept secret. In this respect, the maker of so-called proprietary medicines, unpatented, stands on no different footing from that of other manufacturers. The fact that the article is represented to be curative in its properties does not justify a restriction of trade which would be unlawful as to compositions designed for other purposes.

Second. We come, then, to the second question -- whether the complainant, irrespective of the secrecy of its process, is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture.

The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer.

But because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid.

"The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in Coke on Littleton, section 360,"

"be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath

Page 220 U. S. 405

no possibility of a reverter, and it is against trade and traffic and bargaining and contracting between man and man."

John D. Park & Sons Co. v. Hartman, 153 F. 24. *See also* Gray on Restraints on Alienation of Property, 27, 28.

Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for

future sales. It has been held by this Court that no such privilege exists under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production. *Bobbs-Merrill Co. v. Straus,* 210 U. S. 339 . There, the Court said (p. 210 U. S. 351):

"The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment."

It will hardly be contended with respect to such a matter that the manufacturer of an article of commerce not protected by any statutory grant is in any better case. *See Taddy & Co. v. Sterious & Co.* (1904), 1 Ch. 354; *McGruther v. Pitcher* (1904), 2 Ch. 306; *Garst v. Hall & L. Co.,* 179 Mass. 588. Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement.

Page 220 U. S. 406

With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as

against public policy. As was said by this Court in *Gibbs v. Consolidated Gas. Co.,* 130 U. S. 409 :

"The decision in *Mitchel v. Reynolds,* 1 P. Wms. 181, *s.c.,* 1 Smith's Leading Cases, 7th Eng. ed. 407, 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon v. Rousillon,* 14 Ch.Div. 351; *Leather Cloth Co. v. Lorsont,* 9 Eq. 345."

"The true view at the present time," said Lord Macnaghten in *Nordenfelt v. Maxim-Nordenfelt &c.; Co.,* 1904, A.C. p. 565,

"I think, is this: the public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special

circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable -- reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

The present case is not analogous to that of a sale of goodwill, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to the manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they

Page 220 U. S. 408

sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public

interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. *People v. Sheldon,* 139 N.Y. 251; *Judd v. Harrington,* 139 N.Y. 105; *People v. Milk Exchange,* 145 N.Y. 267; *United States v. Addyston Pipe & Steel Co.,* 85 F. 271, *on appeal,* 175 U. S. 175 U.S. 211; *Montague & Co. v. Lowry,* 193 U. S. 38 ; *Chapin v. Brown,* 83 Ia. 156; *Craft v. McConoughy,* 79 Ill. 346; *W. H. Hill Co. v. Gray & Worcester,* 127 N.W. 803.

The complainant's plan falls within the principle which condemns contracts of this class. It in effect creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce, and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains in such a case a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one,

Page 220 U. S. 409

or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

The questions involved were carefully considered and the decisions reviewed by Judge Lurton in delivering the opinion of the circuit court of appeals in *John D. Park & Sons Co. v. Hartman, supra,* and, in following that case, it was concluded below that the restrictions sought to be enforced by the bill were invalid both at common law and under the Act of Congress of July 2, 1890. We think that the court was right.

The allegations of the bill as to the labels and cartons used by the complainant are evidently incidental to the main charge as to the procurement of violation of the restrictions as to prices and vendees contained in the agreement, and failing as to this, no case is made for relief with respect to the trademarks, which are not shown to have been infringed.

Judgment affirmed.

MR. JUSTICE LURTON took no part in the consideration and decision of this case.

MR. JUSTICE HOLMES, dissenting:

This is a bill to restrain the defendant from inducing, by corruption and fraud, agents of the plaintiff and purchasers from it to break their contracts not to sell its goods below a certain price. There are two contracts concerned. The first is that of the jobber or wholesale agent to whom the plaintiff consigns its goods, and I will say a few words about that, although it is not this branch of the case that induces me to speak. That they are agents, and not buyers, I understand to be conceded, and I do not see how it

Page 220 U. S. 410

can be denied. We have nothing before us but the form and the alleged effect of the written instrument, and they both are express that the title to the goods is to remain in the plaintiff until actual sale as permitted by the contract. So far as this contract limits the authority of the agents as agents, I do not understand its validity to be disputed. But it is construed also to permit the purchase of medicine by consignees from other consignees, and to make the specification of prices applicable to goods so purchased as well as to goods consigned. Hence, when the bill alleges that the defendant has obtained medicine from these agents by inducing them to break their contracts, the allegation does not require proof of breach of trust by an agent, but would be satisfied by proving a breach of promise in respect of goods that the consignee had bought and owned. This reasoning would have been conclusive in the days of Saunders if the construction of the

contract is right, as I suppose that it is. But the contract as to goods purchased is at least in the background and obscure; it is not the main undertaking that the instrument is intended to express. I should have thought that the bill ought to be read as charging the defendant with inducing a breach of the ordinary duty of consignees as such (*Swift & Co. v. United States,* 196 U. S. 375 , 196 U. S. 395), and therefore as entitling the plaintiff to relief (*Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 151 U. S. 1).

The second contract is that of the retail agents, so called, being really the first purchasers, fixing the price below which they will not sell to the public. There is no attempt to attach a contract or condition to the goods, as in *Bobbs-Merrill Co. v. Straus,* 210 U. S. 339 , or in any way to restrict dealings with them after they leave the hands of the retail men. The sale to the retailers is made by the plaintiff, and the only question is whether the law forbids a purchaser to contract with his vendor that he will not sell

Page 220 U. S. 411

below a certain price. This is the important question in this case. I suppose that, in the case of a single object, such as a painting or a statute, the right of the artist to make such a stipulation hardly would be denied. In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts, each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the Court. In the first place, by a slight change in the form of the contract, the plaintiff can accomplish the result in a way that would be beyond successful attack. If it should make the retail dealers also agents in law as well as in name, and retain the title until the goods left their hands, cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

But I go farther. There is no statute covering the case; there is no body of precedent that, by ineluctable logic, requires the conclusion to which the Court has

come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters, we are in perilous country. I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What, then, is the ground upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point, I confess that I am in a minority as to larger issues than

are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles' medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer, so I see nothing to warrant my assuming that the public will not be served best by the company's being allowed to carry out its plan. I cannot believe that, in the long run, the public will profit by this Court's permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

The conduct of the defendant falls within a general prohibition of the law. It is fraudulent, and has no merits of its own to recommend it to the favor of the court. An injunction against a defendant's dealing in nontransferable round-trip reduced-rate tickets has been granted to a railroad company upon the general principles of the law protecting contracts, and the demoralization of rates has

Page 220 U. S. 413

been referred as a special circumstance in addition to the general grounds. *Bitterman v. Louisville & Nashville R. Co.,* 207 U. S. 205 , 207 U. S. 222 -224. The general and special considerations equally apply here, and we ought not to disregard them unless the evil effect of the contract is very plain. The analogy relied upon to establish that evil effect is that of combinations in restraint of trade. I believe that we have some superstitions on that head, as I have said; but those combinations are entered into with intent to exclude others from a business naturally open to them, and we unhappily have become familiar with the methods by which they are carried out. I venture to say that there is no likeness between them and this case (*Jayne v. Loder,* 149 F. 21, 27), and I think that my view prevails in England (*Elliman, Sons & Co. v. Carrington & Son* [1901], 2 Ch. 275). *See Garst v. Harris,* 177 Mass. 72; *Garst v. Charles,* 187 Mass. 144. I think also that the importance of the question and the popularity of what I deem mistaken notions makes it my duty to express my view in this dissent.